

JUDGE FURMAN

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

12 CIV 7432

BICKEL & BREWER,

Plaintiff,

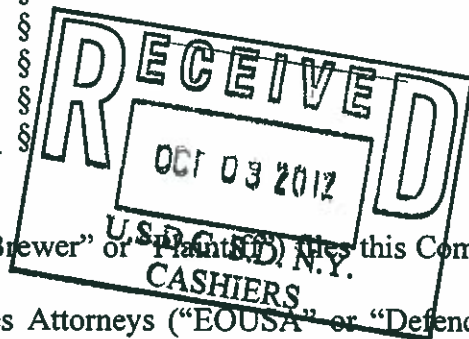
v.

**EXECUTIVE OFFICE FOR UNITED
STATES ATTORNEYS,**

Defendant.

COMPLAINT

Civil Action No.



Plaintiff Bickel & Brewer ("Bickel & Brewer" or "Plaintiff") files this Complaint against the Executive Office for United States Attorneys ("EOUSA" or "Defendant"), based on personal knowledge as to itself and upon information and belief as to all other matters, as follows:

I.

NATURE OF THE ACTION

1. Plaintiff has commenced this action to compel Defendant to comply with its obligation to provide Plaintiff with the records and information Plaintiff has requested under the Freedom of Information Act (the "Act" or "FOIA"). Plaintiff made its request for information under FOIA over four years ago, and Defendant informed Plaintiff that it had completed the search for documents responsive to that request over two years ago, at which time Plaintiff sent Defendant an advance payment for duplication charges. To date, however, Defendant has neglected to produce any information responsive to Plaintiff's request, and has failed to respond to Plaintiff's numerous inquiries as to the status of its request. As a result of Defendant's inaction and delay, Plaintiff is forced to

bring this action under FOIA, 5 U.S.C. § 552(a)(6)(C)(i), to compel Defendant to respond to Plaintiff's request for information and provide Plaintiff the documents it has requested.

II.

JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction pursuant to:
 - a. FOIA, 5 U.S.C. § 552(a)(6)(C)(i) because: (i) this action arises under the Act; and (ii) Plaintiff has exhausted its administrative remedies as required by FOIA; and
 - b. 28 U.S.C. § 1331, because the United States District Courts possess general federal question jurisdiction for claims arising under the laws of the United States.

3. Pursuant to 28 U.S.C. § 1391(e)(1)(C), venue is proper in the Southern District of New York because Defendant is an agency of the United States, Plaintiff is subject to personal jurisdiction in this District, and no real property is involved in this action.

III.

PARTIES

4. Plaintiff Bickel & Brewer is a Texas general partnership with a principal place of business in Dallas, Texas and an office in New York, New York.

5. Defendant EOUSA is a subdivision of the United States Department of Justice and was created on April 6, 1953, by AG Order No. 8-53 to provide for close liaison between the Department of Justice in Washington, D.C., and the ninety-three United States Attorneys located throughout the fifty states, the District of Columbia,

Guam, the Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. The EOUSA is an agency within the meaning of 5 U.S.C. § 552(f)(1).

IV.

PLAINTIFF'S FOIA REQUEST

6. The decades-long accounting fraud at Computer Associates, Inc. ("CA") is by now well known. In February 2002, the United States Attorney's Office for the Eastern District of New York and the Securities and Exchange Commission initiated a joint investigation into CA's accounting and financial reporting. The fraud and ensuing cover-up – characterized by federal prosecutors as "the most brazen and most comprehensive obstruction that this office witnessed in recent history" – resulted in convictions and prison terms for several of CA's most senior executives, the payment of \$174 million in CA stock to settle shareholder lawsuits, and the payment of an additional \$225 million in criminal fines.

7. The effects of that fraud and corruption are still being felt by CA investors, including Plaintiff's clients. In the interest of investors and good corporate governance, Plaintiff has requested documents it believes will shed further light on the CA fraud and ensuing cover-up.

8. Specifically, on June 19, 2008, pursuant to FOIA, Plaintiff made a written request (the "FOIA Request") to William Stewart, Assistant Director of the EOUSA's FOIA/Privacy Staff. A true and correct copy of the FOIA Request, with proof of receipt, is attached hereto as Exhibit A. The FOIA Request seeks:

- a. all non-exempt records maintained by the EOUSA relating to the investigation and prosecution of Computer Associates International, Inc. which was undertaken by the United States Attorneys Office for the Eastern District of New York and resulted in a Deferred Prosecution Agreement (the "DPA"); and

- b. all non-exempt records maintained by the EOUSA relating to the investigation and/or prosecution of any CA director, officer, executive or employee relating to the violations of federal securities laws and/or obstruction of justice referenced in the DPA, including, but not limited to, Charles Wang, Sanjay Kumar, Peter Schwartz, Ira Zar, Stephen Richards, David Kaplan, David Rivard, Lloyd Silverstein, Steve Woghin, Thomas Bennett, Michael McElroy, and Charles McWade.

V.

DEFENDANT HAS FAILED TO PRODUCE THE REQUESTED DOCUMENTS

9. Plaintiff received no response to its FOIA Request from EOUSA. On September 16, 2008, fifty-seven business days after Plaintiff submitted its FOIA Request, Plaintiff wrote a letter to William Stewart requesting that EOUSA comply with its FOIA obligations and respond to Plaintiff's FOIA Request. A true and correct copy of Plaintiff's letter dated September 16, 2008, to William Stewart, attaching a true and correct copy of the certified mail receipt demonstrating EOUSA's receipt of Plaintiff's FOIA request, dated June 19, 2008, is attached hereto as Exhibit B.

10. By letter dated October 1, 2008, Mr. Stewart: (i) acknowledged receipt of Plaintiff's letter dated September 16, 2008; (ii) assigned Plaintiff's FOIA Request a tracking number; (iii) requested that Plaintiff complete a notification form to inform EOUSA if Plaintiff wished to limit its FOIA Request; and (iv) asserted that EOUSA had no record of Plaintiff's FOIA Request dated June 19, 2008. A true and correct copy of the letter dated October 1, 2008, from William Stewart to Plaintiff, is attached hereto as Exhibit C.

11. On October 1, 2008, Plaintiff immediately responded to Mr. Stewart's letter by forwarding the notification form to EOUSA confirming that Plaintiff did not wish to limit the number of hours that EOUSA devoted to searching for responsive

documents. A true and correct copy of Plaintiff's notification form dated October 1, 2008, is attached hereto as Exhibit D.

12. On August 24, 2010, over twenty-six (26) months after Plaintiff's FOIA Request and over twenty-two (22) months after Plaintiff submitted its notification form, Plaintiff received a letter dated August 20, 2010, from Mr. Stewart. In that letter, Mr. Stewart informed Plaintiff that EOUSA had located 584 boxes of documents that are potentially responsive to Plaintiff's FOIA Request and that EOUSA estimated that approximately one fourth of those documents will ultimately be released at an approximate copying cost of \$58,390.00. Mr. Stewart further informed Plaintiff that, pursuant to 28 CFR § 16.11(i), EOUSA was requesting an advance payment of \$58,390.00 before further processing Plaintiff's FOIA Request. A true and correct copy of the letter dated August 20, 2010, from William Stewart to Plaintiff, is attached hereto as Exhibit E.

13. On September 10, 2010, Plaintiff sent Defendant an advance payment of \$58,390.000. A true and correct copy of the signed agreement form and accompanying check for advance payment of estimated duplication charges in the amount of \$58,390.00, is attached hereto as Exhibit F.

14. In response to Plaintiff's requests for an update on the status of its FOIA Request, on December 9, 2010, Defendant informed Plaintiff that Plaintiff should expect documents on a rolling basis starting in late February or early March 2011. Defendant, however, did not send any documents. Therefore, on August 26, 2011, Plaintiff contacted Defendant to request an update. At that time, Defendant informed Plaintiff that the United States District Court for the Eastern District of New York (the "Eastern

District Court”) was still in the process of collecting and organizing the information Plaintiff requested.

15. On September 27, 2011, in response to Plaintiff’s request for a further update, Defendant stated that it would contact the Eastern District Court to request that they commence releasing responsive documents to Plaintiff on a rolling basis. Defendant also stated that it anticipated that those releases would begin in the next month.

16. Plaintiff did not receive any documents responsive to its FOIA Request in September or October 2011. Accordingly, on November 17, 2011, Plaintiff again requested an update from Defendant. On that date, Defendant informed Plaintiff that it had inquired with the Eastern District Court and would inform Plaintiff as soon as it received a response.

17. Because Plaintiff did not receive any documents or response from Defendant, on January 12, 2012, Plaintiff made a written request for an update on the status of its FOIA Request. A true and correct copy of Plaintiff’s letter dated January 12, 2012, to Sean J. Vanek, an Attorney Advisor with EOUSA’s FOIA/Privacy Staff, is attached hereto as Exhibit G. On February 10, 2012, Defendant informed Plaintiff that it would inquire with the Eastern District Court regarding when they would begin releasing documents responsive to Plaintiff’s FOIA Request.

18. Again, however, Plaintiff did not receive any documents responsive to its FOIA Request. Moreover, despite numerous attempts to contact Defendant regarding an update, Plaintiff received no response from Defendant. Accordingly, on April 12, 2012, Plaintiff made another written request for an update on the status of its FOIA Request. A

true and correct copy of Plaintiff's letter dated April 12, 2012, to Sean J. Vanek, is attached hereto as Exhibit H.

19. Defendant has not responded to Plaintiff's request for an update or released any documents responsive to Plaintiff's FOIA Request. To date, over four years have elapsed since Plaintiff first made its FOIA Request, over two years have elapsed since Plaintiff made an advance payment for duplication costs, and over twenty-one months have elapsed since Defendant informed Plaintiff that it would begin releasing documents.

20. Defendant's inaction constitutes a violation of 5 U.S.C. § 552(a)(3)(A). Defendant was obligated to promptly produce the documents and information requested by Plaintiff over four years ago, but has failed to do so.

21. Plaintiff, therefore, brings this action to compel Defendant to comply with its obligations under the Act.

22. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), Plaintiff has exhausted its applicable administrative remedies.

VI.

CLAIMS FOR RELIEF

CLAIM 1

(Violation of FOIA – Failure to Provide Requested Documents)

23. Plaintiff repeats and incorporates the allegations set forth above in Paragraphs 1 through 20 hereof as if fully set forth herein.

24. By failing to timely provide the requested documents to Plaintiff, Defendant has violated 5 U.S.C. § 552(a)(3)(A), which requires Defendant to make

“promptly available” records that are “reasonably described” in a written request therefor and are not exempt from disclosure.

25. Accordingly, pursuant to 5 U.S.C. § 552(a)(3)(A), Defendant should be compelled to respond to Plaintiff’s request and to immediately provide Plaintiff all the information, documents, and records requested by Plaintiff in its FOIA Request.

CLAIM 2

(Recovery of Costs and Fees)

26. Plaintiff repeats and incorporates the allegations set forth above in Paragraphs 1 through 23 hereof as if fully set forth herein.

27. Defendant’s failure to timely respond to Plaintiff’s FOIA Request has forced Plaintiff to bring this action and incur costs and fees of no less than \$10,000.

28. Accordingly, pursuant to 5 U.S.C. § 552(a)(4)(E), Plaintiff is entitled to recover its costs and reasonable attorneys’ fees.

VII.

PRAYER

WHEREFORE Plaintiff respectfully requests that this Court:

1. Require Defendant to immediately respond to Plaintiff’s request and begin production of the requested records within 10 business days of the Court’s order;
2. Award Plaintiff its costs and reasonable attorneys’ fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
3. Grant Plaintiff all other relief that is just and proper.

Dated: October 3, 2012
New York, New York

Respectfully submitted,

BICKEL & BREWER

By: 

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